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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ALLISON EWART, Plaintiff and Respondent, v. COUNTY OF LOS ANGELES et al., Defendants and Appellants.	B286379 (Los Angeles County Super. Ct. No. BC522492)

APPEAL from a judgment and order of the Superior Court of Los Angeles County. William A. MacLaughlin and Elizabeth Allen White, Judges. Affirmed in part, reversed in part, and remanded with directions.

Collins Muir + Stewart, Tomas A. Guterres and James C. Jardin for Defendants and Appellants.

Cole & Loeterman, Dana M. Cole and Nancy Cole Loeterman for Plaintiff and Respondent.

On September 15, 2012, plaintiff and respondent Allison Ewart (Ewart) was hit and seriously injured by a motorist during the Malibu Triathlon. Defendant and appellant County of Los Angeles (the County) conducted all traffic control for the event, and defendant and appellant Widge Galloway (Galloway), the County's designated volunteer traffic control officer (TCO), signaled the motorist to turn right at the subject intersection into the path of Ewart, causing the accident.

Ewart brought this action against the County and Galloway, and a jury found defendants at fault. Defendants appeal.

We reverse the trial court's order denying the County's motion for judgment notwithstanding the verdict (JNOV). Because Galloway was a volunteer at the time she committed her misconduct, her negligence cannot be imputed to the County. Thus, the County was entitled to judgment. The judgment in favor of Ewart and against Galloway is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

I. *Factual Background*

A. The Malibu Triathlon; Waiver to Participate

The Malibu Triathlon is a timed race that consists of three legs: a 1.5 kilometer swim in the Pacific Ocean, a 40 kilometer cycling course along Pacific Coast Highway (PCH), and a 10 kilometer running course along the beach. Before competing, participants are required to execute a waiver and release form, agreeing not to sue law enforcement and other public entities providing support for the event.

The County, by and through its Sheriff's Department (the LASD), was responsible for and conducted all traffic control for the September 15, 2012, Triathlon. It assigned, directed, and

dispatched uniformed, experienced and trained deputies and/or volunteers, including Galloway. Notably, the LASD trained Galloway in her traffic control duties.

B. The Accident

Ewart participated in the September 15, 2012, Triathlon. Prior to participating, like all competitors, she signed the waiver.

Shortly after 8:00 a.m., Ewart had completed the swim course and was cycling northbound on PCH, approaching the intersection of Lunita Road (Lunita) and PCH. Galloway was providing traffic control services at the intersection of Lunita and PCH.

Gillian Verner (Verner), a motorist, arrived at the intersection of Lunita and PCH and came to a complete stop, before initiating a right turn. While Verner was looking at Galloway, Ewart was peddling towards the intersection, at which point Galloway used her right arm to signal Verner to proceed and turn right—directly in front of the oncoming bicyclist (Ewart).

Ewart suffered severe injuries as a result of the accident.

C. Investigation & LASD Report

The LASD investigated the accident. At least one witness told deputies that if anyone was at fault for the accident, it was the volunteers directing traffic. Nevertheless, the traffic collision report did not reference Galloway's presence at the scene; she was also not identified as a party, and no statements were attributed to her.

II. *Procedural Background*

A. Government Claim

On March 5, 2013, Ewart submitted a government claim with the County. She alleged that she sustained injuries as a

result of the automobile versus bicycle accident at the intersection of Lunita and PCH. Her claim provided that "**Government entities**, including but not limited to the . . . County of Los Angeles . . . did things and/or were responsible for doing things regarding the Triathlon, including but not limited to the following: closed off lanes; coned-off lanes, monitored, guided and/or controlled motor vehicle traffic; and/or, monitored, guided and/or controlled bicycle traffic.

"Any and/or all of the above-referenced governmental entities negligently performed their duties and/or created a dangerous condition, causing and/or contributing to [Ewart's] accident and injuries."

The claim listed Galloway as a potential witness.

The County denied Ewart's claim, advising that the accident "'in no way involves the [C]ounty'" and that the premises were "controlled by an entity other than [the] County."

B. Complaint

Ewart filed her original complaint on September 25, 2013, against Verner, the County, and others, including Does 1 through 50. The complaint alleged negligence (motor vehicle), negligence (gross), and dangerous condition of public property, but the County was named as a defendant in the third cause of action only. The complaint specifically alleged that the County and Doe defendants performed traffic control in a negligent manner by allowing a motorist to turn right across the dedicated bicycle lane as Ewart entered the intersection, causing her to collide with the vehicle.

C. First Amended Complaint (FAC); Defendants' Demurrer and Motion to Strike

In March 2016, Ewart filed a motion for leave to file the FAC, seeking to add the County as Doe 12 to the second cause of action (gross negligence) and to add Galloway as a Doe defendant to that same cause of action. In support, Ewart asserted that she first learned of facts suggesting Galloway's role in causing the accident after extensive discovery.

Over defendants' opposition, the trial court granted Ewart's motion. It found that "Existing Defendant County of Los Angeles need only be added to the second cause of action, which would appear to relate back to the filing of the original complaint, as it is based on the exact same incident which caused [Ewart's] injuries." (Fn. omitted.) Moreover, "[t]he addition of the County's traffic control **volunteer**—Widge Galloway—to the second cause of action for gross negligence, might present statute of limitations problems if Galloway is not a true Doe Defendant, but Galloway can challenge that by way of a motion after being brought into the action."

Furthermore, "[t]he County's argument that there is no statutory basis of liability for the gross negligence cause of action, and the government claim does not include a claim for gross negligence, may be tested by way of demurrer." Finally, the trial court noted that the issue of whether Galloway's alleged negligence could be imputed to the County, because Galloway was a volunteer, could be tested on demurrer or other motion.

Shortly after the FAC was filed, defendants filed a demurrer and motion to strike the FAC.

On October 6, 2016, the trial court overruled defendants' demurrer and denied the motion to strike. It held that the

County, a public entity, could be held liable under the principle of respondeat superior for Galloway's acts because, as the County admitted,[1] Galloway was considered "an employee/servant of the County pursuant to Labor Code § 3366."

The trial court further found that no variance existed between Ewart's government claim and the gross negligence cause of action because "the difference between [ordinary] 'negligence' and 'gross negligence[]' is a difference of degree, not the nature of the claim, and does not preclude [Ewart's] claims [from] proceeding here, as there would be substantial compliance with the claims presentation requirement."

Finally, adding Galloway as a Doe defendant was not barred by the statute of limitations because no government claim is required against a government employee if the claim is timely filed against the government entity, which it was here.

D. Pretrial Matters and Trial

Prior to trial, Ewart settled with Verner and dismissed her third cause of action for dangerous condition of public property. Thus, the matter proceeded to trial against the County and Galloway on Ewart's cause of action for gross negligence only.

1. *Galloway's status as a volunteer*

The day before the jury was instructed, the County challenged Galloway's employment status in order to preclude vicarious liability pursuant to Labor Code section 3366. Relying upon *Munoz v. City of Palmdale* (1999) 75 Cal.App.4th 367, 370,

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[1] In its moving papers, defendants asserted: "For purposes of this demurrer and motion to strike, Galloway, as a volunteer for the Sheriff's Department, was an employee/servant of the County. See Labor Code section 3366."

footnote 2 (*Munoz*), the trial court rejected the County's argument, finding that Galloway was an employee of the County for purposes of vicarious liability.

2. *Evidence of the waiver Ewart signed*

Also before the jury was seated, the trial court discussed the exhibit list with counsel. Regarding the waiver that Ewart had signed prior to participating in the Triathlon, Ewart noted her objection to it being admitted into evidence. Counsel spent time discussing the relevance of the waiver with the trial court. At one point, the trial court stated that Ewart could "only win by showing gross negligence, and . . . the point [Ewart was] making is that this release doesn't really have any effect on that issue. If [Ewart is] able to prove that there was gross negligence, then, I think that what everybody is agreeing is, one, the release doesn't preclude that claim." Later, the trial court stated, "I don't have to decide whether [the waiver] is admissible at this point anyway." Because jurors were waiting, the trial court then moved on. It is unclear whether the trial court ever specifically refused to admit the waiver into evidence.

3. *Jury instructions*

Regarding jury instructions, the trial court refused to instruct the jury that bicycle racing is a hazardous recreational activity (Gov. Code, § 831.7).[2]

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[2] Government Code section 831.7 provides, in relevant part: "Neither a public entity nor a public employee is liable to any person who participates in a hazardous recreational activity." (Gov. Code, § 831.7, subd. (a).) "'Hazardous recreational activity'" includes "bicycle racing." (Gov. Code, § 831.7, subd. (b)(3).)

4. *Special verdict*

After hearing all the evidence and testimony, the jury returned a verdict for Ewart, finding that Galloway had acted with gross negligence and that her gross negligence was a substantial factor in causing harm to Ewart. It awarded Ewart $1,398,000 in damages. The jury attributed 85 percent fault to Galloway and 15 percent fault to Verner. Thus, judgment was entered against defendants in the amount of $1,228.050.

E. Posttrial Motions

Following the jury verdict, defendants filed motions for a new trial and JNOV, raising several of the arguments previously rejected by the trial court. The trial court denied defendants' motions, reasoning, inter alia, that Galloway was a long term volunteer for the Los Angeles County Sheriff's Department, had been trained by it in traffic control duties, that she had attended a meeting before the Triathlon began at the Sheriff's Lost Hills station and was given specific instructions on her duties during the race.

Also, pursuant to Labor Code section 3366, Galloway was engaged in assisting a peace officer in active law enforcement at the request of the peace officer; thus, she was deemed to be an employee of the public entity.

Furthermore, the trial court rejected the County's contention that "it was error for the [trial] court to permit [Ewart] to proceed with her claim of gross negligence because [her government claim] did not characterize the negligence as gross." In so ruling, the trial court reasoned that "the failure to characterize the negligence as gross is of no consequence as [Ewart's] claim . . . alleged a factual basis for a claim of gross negligence that is fairly reflected in the written claim."

F. Appeal

Defendants' timely appeal ensued.

DISCUSSION

I. *JNOV based upon Galloway's status as a volunteer*

A. Standard of review

"Ordinarily, when reviewing a JNOV, an appellate court will use the same standard the trial court uses in ruling on the motion, by determining whether it appears from the record, viewed most favorably to the party securing the verdict, that any substantial evidence supports the verdict." (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 284.) "Here, however, the issue[] presented deal[s] solely with interpretation of a statute and application of statutory language to the undisputed facts. Review of such issue[] takes place de novo." (*Ibid.*)

B. Analysis

The County contends that the trial court erred in denying its JNOV motion because the "undisputed evidence establishe[d] that the vicarious liability of [the County was] based on the acts or omissions of an unpaid volunteer." Because Galloway was an unpaid volunteer, and unpaid volunteers do not meet the definition of "employee" under the Labor Code, the County argues that it cannot be held vicariously liable for Galloway's alleged negligence.

We agree. "A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative." (Gov. Code, § 815.2.) Thus, the County is only liable for Galloway's

misconduct if she was an employee of the County at the time she committed her act of gross negligence.

It is undisputed that Galloway was acting as an unpaid volunteer, not an employee, during the Triathlon. As such, her misconduct cannot be imputed to the County. (*Munoz*, *supra*, 75 Cal.App.4th at p. 372.)

In an effort to circumvent this holding, Ewart claims that Galloway must be deemed an employee pursuant to Labor Code section 3366 because she was assisting in the performance of law enforcement duties at the time Ewart was injured.

Labor Code section 3366, subdivision (a), provides, in relevant part, that any person "engaged in the performance of active law enforcement service as part of the posse comitatus or power of the county, and each person . . . engaged in assisting any peace officer in active law enforcement service at the request of such peace officer, is deemed to be an employee of the public entity that he or she is serving or assisting in the enforcement of the law, and is entitled to receive compensation from the public entity in accordance with the provisions of this division."

Assuming that, as a TCO, Galloway was engaged either in active law enforcement service or in assisting the peace officers in active law enforcement (*Gund v. County of Trinity* (2018) 24 Cal.App.5th 185, 195–197, review granted Aug. 22, 2018, S249792), her gross negligence still cannot be imputed to the County pursuant to this statute. As the County rightly points out, Labor Code section 3366 falls squarely within the workers' compensation and insurance division of the Labor Code. (*Page v. City of Montebello* (1980) 112 Cal.App.3d 658, 669 [Labor Code section 3366 "is limited in application to workers' compensation benefits"].) Indeed, the statute explicitly limits its rule to the

"purposes of this division" (Lab. Code, § 3366), a limitation we cannot ignore (*Klein v. United States of America* (2010) 50 Cal.4th 68, 80 ["courts must strive to give meaning to every word in a statute and to avoid constructions that render words, phrases, or clauses superfluous"]). Thus, we conclude that Labor Code section 3366 only dictates that unpaid volunteers may be able to claim workers' compensation benefits if they are injured while engaged in active law enforcement (see, e.g., *Sharareh v. Workers' Comp. Appeals Bd.* (2007) 156 Cal.App.4th 189, 191 [Labor Code section 3366 provides benefits to an individual who is injured while assisting a peace officer at the officer's request]); nothing in Labor Code section 3366 expands the scope of vicarious liability to hold a governmental entity liable for one of its volunteers' actions.

Our conclusion is supported by public policy. "From a public policy standpoint, the volunteer exclusion serves the common good by protecting against the serious drain on limited funds that would result if vicarious liability were permitted to be imposed for the alleged torts of unpaid volunteers." (*Munoz*, *supra*, 75 Cal.App.4th at p. 372.)

Urging us to affirm, Ewart points to *Munoz*, *supra*, 75 Cal.App.4th at page 370, footnote 2, which recognizes "exceptions to the volunteer exclusion," including "certain persons assisting law enforcement officers ([Lab. Code,] § 3366)." (*Munoz*, *supra*, at p. 370, fn. 2.) Relying upon this language, Ewart argues that Labor Code section 3366 provides a broad exception to the volunteer exclusion. We are not convinced. Aside from the fact that the *Munoz* court's comments were dicta, to the extent the *Munoz* court was suggesting that Labor Code section 3366 expanded government liability for unpaid volunteers, we

respectfully disagree. As set forth above, Labor Code section 3366 applies in the context of workers' compensation benefits only.

It follows that the trial court erred in denying the County's motion for JNOV. The County was entitled to judgment.

II. *Jury instructions*

Galloway[3] argues that the trial court's refusal to instruct on inherently dangerous activities and vicarious liability was prejudicial error.

A. Relevant law

"[T]here is no rule of automatic reversal or 'inherent' prejudice applicable to any category of civil instruction error, whether of commission or omission. A judgment may not be reversed for instructional error in a civil case 'unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' [Citation.]" (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580.)

When reviewing a charge of instructional error, "we assume the jury might have believed appellant's evidence and, if properly instructed, might have decided in appellant's favor. [Citation.] 'Accordingly, we state the facts most favorably to the party appealing the instructional error alleged, in accordance with the customary rule of appellate review. [Citation.]' [Citations.] [¶] Still, '[i]n a civil case an instructional error is prejudicial reversible error only if it is *reasonably probable* the appellant

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[3] Because the County is entitled to judgment for the reasons set forth above, we address the remaining arguments as to Galloway only.

would have received a more favorable result in the absence of the error. [Citations.]' [Citations.] . . . [¶] Hence, when evaluating the evidence to assess the likelihood that the trial court's instructional error prejudicially affected the verdict, we 'must also evaluate (1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled.' [Citation.]" (*Mayes v. Bryan* (2006) 139 Cal.App.4th 1075, 1087–1088.)

B. Analysis

Applying these legal principles, we conclude that the trial court did not err. Pursuant to Government Code section 831.7, subdivision (b)(3), bicycle racing constitutes a hazardous recreational activity, and therefore, a public entity is immune from liability for same. However, there is a statutory exception for gross negligence committed by a public employee that specifically causes injury to another during a bicycle race. (Gov. Code, § 831.7, subd. (c)(1)(E).) Ewart proceeded to trial on her theory of gross negligence only. Thus, any issue related to government immunity for ordinary negligence was irrelevant.

III. *Alleged evidentiary error*

Galloway asserts that the trial court's refusal to admit the waiver into evidence amounted to prejudicial error.

A. Forfeiture

Preliminarily, it is unclear whether the trial court ever sustained Ewart's objection to the admission of the waiver into evidence. As set forth above, prior to trial, the trial court indicated that it tended to agree with Ewart that the waiver was irrelevant given that Ewart was proceeding to trial on a claim of gross negligence only. But, the trial court expressly stated that it was not ruling on the issue at that time, and Galloway has not

directed us to any portion of the appellate record in which the trial court expressly sustained Ewart's evidentiary objection. It follows that Galloway has not met her burden on appeal. (Cal. Rules of Court, rule 8.204(a)(1)(C); *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115 [appellate court is not required to make an independent, unassisted search of the appellate record].) Our analysis could stop here. (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545–546 [if an appellant fails to cite to the record, we may treat the issue as waived].)

For the sake of completeness, we turn to the merits of Galloway's argument.

B. Standard of review

We review alleged evidentiary errors for abuse of discretion. (*Christ v. Schwartz* (2016) 2 Cal.App.5th 440, 446–447.)

C. Analysis

The trial court did not abuse its discretion in refusing to admit the waiver that Ewart signed into evidence. Liability waivers do not insulate tortfeasors for gross negligence. (*Hass v. RhodyCo Prod.* (2018) 26 Cal.App.5th 11, 31.) Because the jury was only asked to decide whether defendants were liable for gross negligence, the waiver was irrelevant and did not need to be admitted into evidence.

IV. *Statute of limitations*

Galloway contends that Ewart's claims against her were untimely and therefore barred by the applicable statute of limitations. According to Galloway, "the trial court should either have denied leave to amend or sustained . . . Galloway's demurrer without leave to amend."

A. Standard of review

Galloway challenges two trial court rulings: The order granting Ewart leave to file her FAC, and the order denying Galloway's demurrer without leave to amend. We review the order granting Ewart leave to amend for abuse of discretion. (*Haley v. Dow Lewis Motors, Inc.* (1999) 72 Cal.App.4th 497, 506.) We review the order overruling Galloway's demurrer de novo. (*Big Valley Band of Pomo Indians v. Superior Court* (2005) 133 Cal.App.4th 1185, 1190.) In so doing, "[i]t is well settled that evidentiary matters outside the complaint may not be considered." (*Ibid.*)

B. Analysis

Both orders of the trial court were correct.

Regarding her motion for leave to file the FAC, as the trial court found, Ewart timely filed her government claim against the County and then timely filed her original complaint. Only through protracted discovery did Ewart learn of Galloway's culpability. Thus, the trial court acted well within its discretion in granting her leave to file the FAC.

And, the trial court properly overruled Galloway's demurrer as she was a proper Doe defendant. Code of Civil Procedure "'[s]ection 474 allows a plaintiff in good faith to delay suing particular persons as named defendants *until [she] has knowledge of sufficient facts to cause a reasonable person to believe liability is probable*. The distinction between a suspicion that some cause *could exist* and a factual basis to believe a cause *exists* is critical in the operation of [Code of Civil Procedure] section 474. The former is one reason attorneys include general charging allegations against fictitiously named defendants; the latter requires substitution of the defendant's true name.'"

(*General Motors Corp. v. Superior Court* (1996) 48 Cal.App.4th 580, 595.)

Looking only at the four corners of the FAC, and not evidentiary matters outside the scope of the pleading, at the time Ewart filed her government claim, she did not know the extent of Galloway's culpability. In fact, Ewart specifically alleges that she was unaware of Galloway until after she filed her original complaint and after Galloway's deposition, which did not occur until July 2014 and November 2015. Liberally construing the FAC, we can infer that Ewart was unaware of Galloway's role in causing the accident until Galloway's deposition was completed. Under these circumstances, we conclude that the trial court rightly overruled Galloway's demurrer to the FAC.

V. *Claims variance*

In their opening brief, both defendants argued that they were entitled to judgment as a matter of law based on claims variance. As set forth above, the County is entitled to judgment because Galloway was acting as a volunteer. Thus, the only issue remaining is whether Galloway is entitled to judgment pursuant to the claims variance doctrine. But the claims presentation requirement applies only to public entities, not to individuals volunteering for a public entity. (Gov. Code, § 905.2.) It follows that the claims variance doctrine does not provide a basis for reversing the judgment against Galloway.

DISPOSITION

The trial court's order denying the County's motion for JNOV is reversed and the matter is remanded with directions to the trial court to enter judgment in favor of the County. The judgment against Galloway is affirmed. The parties to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT